

The case presented for the applicant is first, that the registration of the respondent's mark is in contravention of section 15 of the Trade Marks Ordinance in that the use of the respondent's mark would by reason of its being likely to deceive or cause confusion or otherwise be disentitled to protection in a Court of Justice and that if the Registrar of Trade Marks had been aware of the considerations which are now before the Court he would have refused registration. Secondly, that the registration of the respondent's mark is in contravention of section 23 of the Ordinance in that it is registered in respect of some goods of a description which is identical with a trade mark belonging to a different proprietor which is already on the register in respect of the same goods or description of goods, or that it so nearly resembles such a trade mark as to be likely to deceive or cause confusion.

The main contention of the respondent is that the respondent's mark does not so nearly resemble the applicant's mark as to be likely to deceive or cause confusion.

The burden of satisfying the Court that the existence of the respondent's mark on the register is likely to deceive or cause confusion is upon the applicant.

Now, the evidence is that by the 27th July, 1961, the "Panda" steel wool manufactured by the applicant has been on sale in Singapore for five years and it has become known in the Singapore market amongst the non-English speaking people as the "Bear Brand". This is the uncontradicted evidence of Madam Ha Niat Yin. It is clear that at the date of registration of the respondent's mark there was such a likelihood of confusion or deception that the Registrar would have refused registration under section 15 if he had been aware of all the circumstances. On this alone the applicant is entitled to succeed.

The applicant, however, further submitted that the respondent's mark is remaining wrongly on the register contrary to section 39(1)(a). It seems to me that even if the respondent's mark was properly put on the register, it has become calculated to deceive through the subsequent acts of the respondent by using a get-up in the packing of its product so confusingly similar to the get-up in the packing of the applicant's product. There is no doubt that, from the close similarities in the mark and get-up between the applicant's packing and the respondent's packing, the respondent's mark was chosen by them as being calculated to deceive. In my judgment the applicant has discharged the onus which is upon it to show that the mark of the respondent remains wrongly on the register.

For the reasons I have given, the applicant is entitled to the relief it seeks. There will be an order in terms of the motion. The respondent is to pay the costs of the applicant.

Order in terms.

Solicitors: *Drew & Napier; de Souza & de Souza.*

PUBLIC PROSECUTOR v. WAN HEE

[A. Cr. J. (Ong J.) August 1, 1962]

[K.L. — Criminal Appeal No. 29 of 1962]

Pawnbrokers — Receiving articles in pawn as security for loan — Interest — Pawnbrokers Enactment (Cap. 85), ss.2 and 3(ii) — Meaning of provisions of.

Moneylending — Receiving articles in pawn as security for loans — Obtaining promissory note and giving "collateral security" receipt for articles deposited — Moneylenders Ordinance, 1951, s.5 — Pawnbrokers Enactment (Cap. 85), ss.3 and 25.

The respondent, a licensed moneylender under section 5 of the Moneylenders Ordinance, carrying on business of moneylending under the name of Koon Sang Finance Co., on various dates received gold ornaments in pawn as security for loans of \$75, \$70 and \$80 respectively advanced to three persons at the interest rate of 12% per annum and, instead of issuing the statutory form of pawnbroker's receipt, obtained from each borrower a promissory note for the amount lent which was expressed to be repayable "on demand six months after date", and gave to the borrower a receipt for the articles deposited "as collateral security" for the repayment of the loan. At the hearing before the learned Magistrate counsel's contention to the effect that nowhere in section 3 of the Pawnbrokers Enactment was it provided that a contravention of this section was an offence was upheld by the learned Magistrate.

Held: the penalty for contravention of section 3 of the Enactment was laid down in section 25 and the respondent was guilty of the offence of acting as a pawnbroker without a licence.

Observations on section 2 read as qualified by section 3(ii) of the Pawnbrokers Enactment.

MAGISTRATE'S CRIMINAL APPEAL.

H. S. Ong (Deputy Public Prosecutor) for the appellant.

S. D. K. Peddie for the respondent.

Cur. Adv. Vult.

Ong J.: This is an appeal by the Public Prosecutor against an order of the learned Magistrate, Kuala Lumpur, acquitting the respondent, at the close of the prosecution, on three charges of having, on three specified dates in 1960, acted as a pawnbroker without a licence granted under the Pawnbrokers Enactment in contravention of section 3 and punishable under section 25 of the Enactment.

The facts are not disputed. The respondent was at all relevant times a moneylender licensed, under section 5 of the Moneylenders Ordinance, 1951, to carry on the business of moneylending under the name of Koong Sang Finance Co. at No. 108 Brickfields Road, Kuala Lumpur. On various dates in 1960 he received gold ornaments in pawn as security for loans of \$75, \$70 and \$80 respectively advanced to three persons at the interest rate of 12% per annum. Instead of issuing the statutory form of pawnbroker's receipt, the respondent obtained from each borrower a promissory note for the amount lent which was expressed to be repayable "on demand six months after date," and gave to the borrower a receipt for the articles deposited "as collateral security" for the repayment of the loan.

A preliminary objection on a point of law raised by Dato Rajasooria before the com-

mencement of the trial, and repeated, as a submission at the close of the prosecution, was that there was no case for the respondent to answer. It was to the effect that "nowhere is it stated in section 3 of the Pawnbrokers Enactment (Cap. 85) that contravention of this section is an offence." The learned Magistrate agreed and acquitted the respondent.

The section reads as follows:

"3(1) No person shall act as a pawnbroker except under a licence granted under this Enactment.

Among the four sections providing for penalties and forfeitures under the Enactment, the penalty for pawnbroking without a licence is specifically stated in section 25 as follows:

"25. Every person who shall act as a pawnbroker except under a licence granted under this Enactment shall be liable for a first offence to a fine of one thousand dollars, and for a second, etc."

In the face of words so clear and free from ambiguity laying down the penalty for contravention of section 3, it is a startling proposition to submit — contrary to the numerous examples to be found in our statutes — that the offence and the penalty should be contained in the same clause before the breach of a statutory duty can be punished. Counsel quoted no authority for this extraordinary proposition and I should be very much surprised if any amount of industry should have enabled him to discover one. An Ordinance must be read as a whole, and section 51 of the Interpretation and General Clauses Ordinance sets out all that is material and relevant in this connection. The order of acquittal must be set aside.

As Mr. Peddie, counsel on behalf of the respondent in this appeal says that the respondent has no further evidence to offer, and his submission will be that in law the holder of a moneylender's licence is not debarred from pawnbroking as part of or in the course of his business, there is no point in referring the case back to the learned Magistrate to hear and determine this point of law. In my opinion the law is quite clear. A "pawnbroker" is defined in section 2 of the Enactment to "mean and include any person who . . . receives any article and . . . advances money upon the same to an amount not exceeding two hundred and fifty dollars" under any agreement that the said article may be afterwards redeemed. The definition must however be read as qualified by subsection (ii) of section 3, namely —

"(ii) For the purpose of this section a person shall not be deemed to act as a pawnbroker in that he makes a loan of any sum of money exceeding one hundred dollars and receives any article in pawn as security for the same, provided that the rate of interest paid or payable upon such loan shall not exceed twelve per centum per annum and that no further or other profit or advantage be taken or agreed upon in respect thereof."

In simple terms the above provisions mean: (a) that if a person makes a loan of any sum over \$100 and receives any article in pawn as security, he will not be deemed to have acted as a pawnbroker so long as the interest payable does not exceed a net 12 per centum per annum; (b) that,

conversely, if the loan so secured and at whatever rate of interest is under \$100, or, if over \$100, his profits (including interest) exceeds 12 per cent. per annum, then he will be deemed to have acted as a pawnbroker; (c) that loans exceeding \$250, though given on the security of articles pawned, do not come within the Pawnbrokers Enactment, whatever the rate of interest.

There is nothing, however, in the Pawnbrokers Enactment or the Moneylenders Ordinance which entitles a licensed moneylender, as such, to act as a "pawnbroker" unless he is also licensed under section 3 of the Enactment. A pawnbroker, as such, may lend only up to \$250; consequently, if he lends more than that amount the provisions of the Moneylenders Ordinance will apply to him: vide section 2(d).

I think the respondent ought to feel grateful to the prosecution for calling a halt to further transactions of this type which appear to have been entered into in disregard of subsections (3) and (4) of section 16 and subsection (2) of section 27 of the Moneylenders Ordinance. The attempt at ingenuity may be defeated by myopia.

I accordingly set aside the order of the Magistrate, and convict the respondent on all charges. On each charge he is fined \$200.

Order accordingly.

Solicitors: *Bannon & Bailey.*

SUBRAMANIAM v. KONAR

[C.A. (Thomson C.J., Rigby and Hepworth JJ.)
November 11, 1958]

[Ipoh — F.M. Civil Appeal No. 25 of 1958]

Moneylending — Promissory note — Delivery of authenticated copy — Sufficiency of written acknowledgment by borrower to establish that copy handed to borrower was duly authenticated — Moneylenders Ordinance, 1951, s.15(1) and (4).

Moneylending transaction — Intention of parties — When possession passes.

Although the burden of proving that an authenticated copy of a promissory note was handed by the moneylender to the borrower under section 16(1) of the Moneylenders Ordinance, 1951, is on the moneylender, nevertheless a written acknowledgment by the borrower to the effect that before giving his promissory note to the lender a copy thereof authenticated by the lender was delivered and received by the borrower is sufficient, if un rebutted, to establish that the copy which was handed to the borrower was authenticated.

When parties voluntarily go to a solicitor for a moneylending transaction it is quite clear that in the absence of any evidence to the contrary it is the intention of both parties that possession of the money shall not pass from the moneylender to the borrower until everything is done that the parties have come to do and until possession passes the money cannot be said to be lent.

Case referred to:—

(1) *Haji Musa bin Abu Bakar v. Prem Singh* F.M. Civil Appeal No. 38 of 1957, (unreported).

COURT OF APPEAL.

S. P. Seenivasagam for the appellant.

B. K. Das for the respondent.

Cur. Adv. Vult.

Thomson C.J.: This is an appeal from a decision of Good J. allowing an appeal from a